

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

BILLY DRIVER, JR.,  
Petitioner,  
v.  
JERRY BROWN, Governor,  
Respondent. } NO. CV 14-1793-BRO (AGR)  
} ORDER TO SHOW CAUSE

On March 11, 2014, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears the one-year statute of limitations has expired.

The court, therefore, orders Petitioner to show cause, on or before **April 25, 2014**, why the court should not recommend dismissal of the petition with prejudice based on expiration of the one-year statute of limitations.

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## **PROCEDURAL BACKGROUND**

In June 1986, Petitioner pled guilty to various crimes in Los Angeles County Superior Court. (Petition at 2). Petitioner was sentenced to “50 years with stipulation of half time.” (*Id.*) Petitioner did not appeal. (*Id.*) However, Petitioner alleges that the government breached the plea agreement in December 2010. (*Id.* at 2 & Memorandum at 2.)

On December 6, 2013, Petitioner filed a habeas petition in the California Supreme Court, which was denied on February 26, 2014. (*Id.*, Exs. A, B.)

On March 11, 2014, Petitioner filed the instant petition in this court in which he raises three grounds.

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## **STATUTE OF LIMITATIONS**

The petition was filed after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Therefore, the court applies the AEDPA in reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

The AEDPA contains a one-year statute of limitations for a petition for writ of habeas corpus filed in federal court by a person in custody pursuant to a judgment of a state court. 28 U.S.C. § 2244(d)(1). The one-year period starts running on the latest of either the date when a conviction becomes final under 28 U.S.C. § 2244(d)(1)(A) or on a date set in § 2244(d)(1)(B)-(D). The only subdivision relevant here is (d)(1)(D).

**A. Date of Discovery – 28 U.S.C. § 2244(d)(1)(D)**

The statute of limitations may start to run on the date a petitioner discovered (or could have discovered) the factual predicate for a claim that his counsel's performance was deficient, or on the date a petitioner discovered (or could have discovered) the factual predicate for prejudice, whichever is later.

1 See *Hasan v. Galaza*, 254 F.3d 1150, 1155 (9th Cir. 2001). Therefore, the statute  
 2 of limitations begins to run on “the date on which the factual predicate of the claim  
 3 or claims presented could have been discovered through the exercise of due  
 4 diligence.” 28 U.S.C. § 2244(d)(1)(D). The statute starts to run when the  
 5 petitioner knows or through diligence could discover the important facts, not when  
 6 the petitioner recognizes their legal significance. *Hasan*, 254 F.3d at 1154 n.3.

7 At the latest, Petitioner learned of his claim on December 31, 2010, when  
 8 he alleges he should have been released per the plea agreement. (Petition,  
 9 Memorandum at 2.)<sup>1</sup> Accordingly, the statute of limitations expired on December  
 10 31, 2011. Absent tolling, the petition is over two years late.

## 11       B.     Statutory Tolling

12       The statute of limitations is tolled during the time “a properly filed  
 13 application for State post-conviction or other collateral review with respect to the  
 14 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2).

15       Because Petitioner did not file his first state habeas petition until 2013, he  
 16 is not entitled to statutory tolling. See *Welch v. Carey*, 350 F.3d 1079, 1081-84  
 17 (9th Cir. 2003) (state habeas petition filed after the limitations has expired does  
 18 not revive the expired limitations period).

19       Absent equitable tolling, the petition is time-barred.

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 23       <sup>1</sup> According to a Chronological History attached by Petitioner, when he  
 24 was first received into the California prison system in 1986, his projected release  
 25 date was in 2010. (Petition Ex. C at 1.) The latest entry in the log dated June 13,  
 26 2013, shows a projected release date in 2024. (*Id.* at 10.)

27       The court takes judicial notice of a habeas petition Petitioner filed in the  
 28 Eastern District of California on April 18, 2011, *Driver v. J. Walker*, Case No. CV  
 11-1055-JFM (HC). According to the magistrate judge reviewing a motion to  
 dismiss, Petitioner alleged that the California Department of Corrections and  
 Rehabilitation and the California government “since 1998 . . . conspired to falsely  
 issue 73 rules violations . . . that deprived him of 4,745 days of good-time  
 credits.” *Id.*, Dkt. No. 25 at 1. The petition was dismissed, and the Ninth Circuit  
 denied a certificate of appealability. *Id.*, Dkt. Nos. 25-27, 36.)

1           **C. Equitable Tolling**

2        “[T]he timeliness provision in the federal habeas corpus statute is subject to  
 3        equitable tolling.” *Holland v. Florida*, 130 S. Ct. 2549, 2554, 177 L. Ed. 2d 130  
 4        (2010). “[A] ‘petitioner’ is ‘entitled to equitable tolling’ only if he shows ‘(1) that he  
 5        has been pursuing his rights diligently, and (2) that some extraordinary  
 6        circumstance stood in his way’ and prevented timely filing.” *Id.* at 2562 (quoting  
 7        *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669  
 8        (2005)). “The diligence required for equitable tolling purposes is “reasonable  
 9        diligence,” not “maximum feasible diligence.” *Id.* at 2565 (citations and quotation  
 10      marks omitted). The extraordinary circumstances must have been the cause of  
 11      an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitabile tolling is available for this  
 12      reason only when “extraordinary circumstances beyond a prisoner’s control  
 13      make it *impossible* to file a petition on time” and “the extraordinary  
 14      circumstances” circumstances” were the *cause* of [the prisoner’s] untimeliness.”  
 15      *Bills v. Clark*, 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted, emphases in  
 16      original).

17       Petitioner does not indicate he is entitled to equitable tolling. The petition  
 18      remains time-barred.

19           **III.**

20           **ORDER TO SHOW CAUSE**

21       IT IS THEREFORE ORDERED that, on or before ***April 25, 2014***, Petitioner  
 22      shall show cause, if there be any, why the court should not recommend dismissal  
 23      with prejudice of the petition based on expiration of the one-year statute of  
 24      limitations.

1           **Petitioner is also advised that if he fails to timely respond to this**  
2           **order to show cause, the court will recommend that the petition be**  
3           **dismissed with prejudice based on expiration of the one-year statute of**  
4           **limitations.**

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6           DATED: March 25, 2014  
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ALICIA G. ROSENBERG  
United States Magistrate Judge